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Supreme Court of the United States of America.

No. 155.

ZEB WARD,

Plaintiff in Error,

vs.

JOSEPH C. TODD, Survivor of the firm of Todd & Rafferty.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DEFENDANT IN ERROR.

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-:-
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Statement of the Case.

This was an action in the Circuit Court for the Eastern District of Arkansas, by the defendant in error against the plaintiff in error, on a decree and judgment for amount of notes and foreclosure of mortgage to secure same, and judgment over against defendant in that suit, recovered on the equity side of the Fayette Circuit

Court of Kentucky, by said defendant against said plaintiff.

Defendant in error sued at law upon the Kentucky judgment, and produced, filed and offered in evidence the transcript of the record in Kentucky. The plaintiff answered three pleas:

FIRST.—Setting up facts alleged to constitute fraud in obtaining the judgment; and that hence the judgment was void.

SECOND.—*Nul tiel record.*

THIRD.—A substantial repetition of the first plea alleging the facts stated in first plea to constitute a payment, and accord and satisfaction of the debt.

Defendant in error demurred to the first and third pleas; and issue was joined on the second plea.

The Court below sustained the demurrers to the first and third pleas, but no exception was taken to this ruling; and decided the issue of *nul tiel record* raised by second plea, in favor of defendant in error. The defendant below declining to plead further, the Court gave judgment accordingly for plaintiff below.

The defendant below filed bill of exceptions, in which he excepted to the admission of the record of the Kentucky judgment; on the ground, that there was neither service of process on defendant below, nor appearnce in person or by attorney by him in the Kentucky suit.

Argument.

The only question raised by the plaintiff in error, in his brief and assignment of errors, is whether there was sufficient service upon or appearance by Ward in the Kentucky suit, to support a personal judgment against him by the Kentucky Court.

And under the 21st rule it is presumed this is the sole question to be passed upon by this Court.

In determining this question, it seems it will only be necessary to examine the record of that suit, to be satisfied of the full and complete jurisdiction of the Court *in personam* over the defendant.

Todd, the plaintiff, below filed his original petition August 8th, 1873, setting up,

FIRST.—The note for $3,528 and mortgage.

SECOND.—The note for $10,733.28 not yet due, and mortgage on same property as first note.

THIRD.—Tax lien for $55.09.

Record, m. p. 20.

And on same date summons was issued to Ward and city of Lexington.

Record, m. p. 36.

Summons served on Ward in Kentucky, September 8th, 1873.

Record, m. p. 36.

On September 17th, 1873, Todd filed an amended complaint, setting up the payment of a lien of $680, held by the city of Lexington on the mortgaged premises.

Record, m. p. 38.

Summons issued on the amended complaint, and was served on Ward in Kentucky, September 18th, 1873.

Record, m. p. 43.

On November 19th, 1873, the Court gave judgment by default against Ward and of foreclosure on the debt due, and sustaining all the liens.

Record, m. p. 44.

On December 6th, 1873, Ward filed an affidavit and motion to set aside the judgment, and offered to file an answer.

Record, m. p. 49.

On December 8th, 1873, the motion of Ward to set aside the judgment was sustained, and Ward allowed to file his answer, "and he is made a party defendant to this action."

Record, m. p. 49.

The sworn answer of Ward sets up,

FIRST.—The $10,733.28 debt is not yet due.

SECOND.—The $680 paid to the city of Lexington, is not a lien.

THIRD.—Tax lien for $55.09 is not due.

FOURTH.—The property is susceptible of division.

This answer is signed—*Buford*, Hustin & Mulligan, P. D., Zeb Ward, and sworn to by Ward.

Record, m. p. 51.

Mrs. Ward also filed a petition, claiming a contingent dower interest in the mortgaged property.

Record, m. p. 52.

On December 9th, 1873, the Court gave judgment on the $3,528 claim, and of foreclosure and sale (first of the personal property), and in this judgment says: "UPON THE OTHER QUESTIONS RAISED IN THE PETITION AND ANSWER HEREIN THE COURT TAKES FURTHER TIME."

"To which judgment of the Court the defendant excepts."

Record, m. p. 55 to 57.

On the 15th of August, 1874, Todd offered to file a second amended petition, "to which *defendant Ward*, by counsel, objected, which objection was overruled by the Court, and said (second) amended petition permitted to be filed, which is noted. To the filing of which defendant excepts."

Record, m. p. 61.

Order for warning order, and H. M. Buford appointed corresponding attorney for the non-resident defendant Zeb Ward.

Record, m. p. 61.

This second amended petition alleges no new cause of aetion, but simply sets up that the debt for $10,733 $\frac{28}{100}$ mentioned in the second paragraph of the original petition, has become due; and prays judgment for debt and foreclosure.

Record, m. pp. 62-64.

On September 9th, 1874, summons and copy of second amended petition were issued.

Record, m. p. 65.

On September 23, 1874; summons and copy of amended petition were served upon Ward, in Arkansas.

Record, m. p. 66.

On November 27th, 1874, the Court gave judgment in favor of Todd, for the $10,733 $\frac{28}{100}$, and foreclosure for that debt and execution for balance. And then proceeds to render judgment in favor of Ward, on two of the liens claimed by Todd, by dismissing Todd's bill as to those claims, as follows: * * * * * "It is further adjudged by the Court, that so much of plaintiffs' petition as relates to the claim of $680 paid to the city of Lexington by plaintiffs, for the original price of the lot mentioned, be and the same is hereby dismissed, and so much of the petition as relates to the claim of $55, paid by plaintiff to R. S. Bullock, Sheriff for Fayette County, for State taxes for the yenr 1872, is also dismissed, and this cause is continued." * * *

It appears from the record, as above stated, that the original petition counted on the $10,733 $\frac{28}{100}$ note, and mortgage on which the final judgment was rendered, though the note was not then due.

It will be observed, that the mortgages to secure each of the notes named in the original petition, were upon the same property. And that the note for $3,528 and mortgage first maturing, and on which the first judgment was rendered, were subsequent in date, and junior to the note and mortgage for $10,733 $\frac{28}{100}$, which were not due until nearly one year later; and consequently it was necessary for the Court in administering equity, to take jurisdiction of both, and for both to be set up in the original petition.

That Ward was served with two writs in Kentucky.

Record, m. pp. 36 and 43.

That on his motion and affidavit (Record M., p. 49,)the first judgment was set aside. That he filed an answer (Record, m. p. 51,) sworn to by himself, disputing two of the claims made by Todd.

That the Court gave judgment against him on the debt already due, and in that judgment (Record, m. p. 57,) *took time to consider the other questions raised by the petition and Ward's answer.* To this judgment Ward by his attorney excepted.

Record, m. p. 57.

Todd then comes into Court and offers to file (a second) amended petition (Record, m. p. 61), to which Ward by his counsel objected; the objection was overruled, and the amended petition was by the Court allowed to be and was filed; to the filing of which Ward by counsel excepted.

This (second) amended petition (Record, m. p. 62,) introduced no new cause of action, but simply sets up the maturity of one of the notes declared on in the original petition and prays judgment.

Thereupon a warning order was taken out, and summons and a copy of the second amended petition served upon Ward in Arkansas.

Record, m. p. 66.

In due course, judgment was rendered against Ward, on the $\$10,733\frac{28}{100}$ note set up in the original petition, the maturity of which is alleged in the second amended complaint. And in this same decree and judgment, the Court gives judgment in Ward's favor (Record, m. p. 75,) upon two of the liens claimed by Todd.

Can it be claimed that Ward can come into Court, open and set aside a judgment against him, appear and answer in the suit, and while the defence set up in his answer is held under advisement and undecided by the Court, "fold his tents like the Arabs, and as silently steal away" out of

the jurisdiction? And thus defraud the Court of the very jurisdiction he had invoked by his answer.

The warning order and summons sued out on the second amended petition, were clearly unnecessary and useless. Ward was in Court in virtue of the original service, appearance and answer. And by attorney, he objected to the filing of this amended petition, and excepted to the ruling of the Court allowing it to be filed. The matters submitted on his answer were yet in the breast of the Court.

Record, m. p. 57.

He had full notice of this amended petition by his counsel, who excepted to its filing. He cannot now be heard to complain that he was served with a summons and copy of the petition in Arkansas. It was unnecessary, it is true; but it did not, therefore, deprive the Court of the jurisdiction it had already obtained.

Ward cannot use this abundant caution of Todd's attorney, to defeat the jurisdiction of the Court. Being in Court and answering, he must abide its decision upon the whole case. And, certainly, he cannot go hence until the matters set up in his answer are decided. The final decree complained of sustained his answer, and gave him the benefit of defeating two of the liens claimed by Todd.

In Ghiselin *vs.* Sterritt, MS. Opin., 1856, cited in Meyer's Kentucky Code notes, p. 426, same case probably cited in Newman's Kentucky Pleading and Practice, p. 711, as Ready *vs.* Smith, &c., MS. Opin., January, 1856; Stanton's Code, p. 117, note b, the Court say: "Where a petition for the enforcement of a lien for purchase money of land, alleges that one note therefor is due, and prays judgment, etc., and further avers that he holds another note, not yet due, for the same consideration, and afterward by an amended petition sets up the latter note, alleging it is due, and praying judgment thereon, it was held that process on

the amended petition, was not necessary under this section" (sec. 159, Kentucky Code).

If process in such case was not necessary, on amendment filed without leave of Court, it is *a fortiori* not necessary, when the amendment is by leave of Court and against the objection of a defendant already in Court.

This Court in the case of Ober *vs.* Gallagher, 3 Otto, 206, say:

"The Court had therefore jurisdiction of the suit as originally brought; and this jurisdiction was not defeated by the amendment which introduced the notes, not in judgment, but secured by the lien in the case. Having obtained rightful jurisdiction of the parties and the subject matter of the action for one purpose, the Court will make its jurisdiction effectual for complete relief." (Story's Eq., 64.)

"If the amendment had not been made the Court would in its decree have taken care to protect the rights of the holders of the outstanding notes, and that is all it is called upon to do by the amendment. Having jurisdiction for one purpose, it may be retained for all within the general scope of the equities to be enforced."

In Nations *vs.* Johnson *et al.*, 24 Howard, 202, this Court say:

"Where a Court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until reversed, as a general rule, is regarded as binding in every other Court. Whenever the parties to a suit, and the subject matter in controversy between them, are within the regular jurisdiction of a Court of Equity, the decree of that Court is to every intent as binding as would be the judgment of a Court of law. Accordingly, it was held by this Court, in Pennington *vs.* Gibson, 16 Howard, 65, that in all cases where an action of debt can be maintained upon a judgment at law to

recover a sum of money awarded by such judgment, the like action may be maintained upon a decree in equity, provided it is for a specific amount, and that the records of the two Courts are of equal dignity and binding obligation. * * *

"Personal service was made upon the defendants in this case by due process of law in the Court of original jurisdiction, and the question here is, whether a party duly served with notice in a subordinate court, after he has appeared and answered to the suit, and secured an erroneous judgment in his favor, may voluntarily absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn. We think not."

In this last case it was contended by plaintiffs in error that the suit in the appellate Court was a new suit, and required new process.

It is attempted by the plaintiff in error to avoid the effect of the Kentucky judgment by alleging the second amended petition to be a new suit, and therefore requiring new process to be served upon Ward. And that the service of a copy of the amended petition and summons upon Ward in Arkansas, being extra territorial did not give the Court jurisdiction to render a personal judgment.

And attempts to avoid Ward's appearance to the amended petition by terming it a special appearance to object to the jurisdiction. It is not claimed that service upon Ward out of the jurisdiction, could of itself authorize a personal judgment against him, but that the service in Arkansas was not necessary, was a work of supererogation; that the Court already had personal service on and jurisdiction over him. And that the judgment is not in contravention of sec. 450 of Kentucky Code, which forbids judgment on constructive service or actual

service out of the state against a party who has not appeared in the action—Ward had appeared in the action and answered.

On page 2 of plaintiff's brief, he says, "this was the end of the suit." How could it be the end of the suit? when the Court still held under advisement the allegations and claims made by Ward's answer.

This amended or supplemental petition, was in no sense, nor for any intent or purpose a new suit. It simply alleged the maturity of a debt already declared on, and to which Ward had pleaded.

It was filed in conformity to sections 161 and 162 of Kentucky Code, which are as follows:

"SEC. 161. The Court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case;" * * *

SEC. 162. "The plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the filing of the former petition, answer or reply."

The Kentucky Court was by these sections compelled to allow an amended or supplemental petition, "inserting other allegations material to the case," or "alleging facts material to the case, occurring after the filing of the former petition." And that was just what the amendment in this case did.

On this subject Judge Newman, in his work on "Pleading and Practice," in Kentucky, says (p. 688): "Nor is any new process necessary on an amended petition, unless it materially change the grounds of complaint, or set out a distinct cause of action variant from that stated in the original petition, for it is a general rule that defendants served

with process on an original bill are bound to know all subsequent proceedings taken in the suit, and need not again be served with process upon new pleadings."

And on page 699: "The Courts of original jurisdiction, before the adoption of the Code, had extensive discretion in allowing amendments of the pleading during the preparation of the cause for trial, and the policy or spirit of the Code is to enlarge rather than to restrict this power. Under the former system it was held that the plaintiff might have been permitted to amend his declaration by adding a new count after plea pleaded, and even after two terms had elapsed, on payment of costs."

And on page 709, "and under the Code the distinction in the names of the pleadings will not be material. If the additional facts be material to the case, they may be stated in a new pleading; and whether it be called by the one name or the other it will make no essential difference."

And on page 711, "So where the original petition set out a good cause of action, and pending the suit a further right of recovery material to the case occurred, the plaintiff will be allowed by supplemental petition to set out an additional cause of action. Thus, where a petition for the enforcement of a lien for the purchase money of land, alleges that one note therefor is due, and prays judgment thereon, and further avers that he holds another note not yet due for the same consideration, he may by supplemental petition set up the latter note, after it is due, alleging that fact, and have judgment upon it."

In Hord *vs.* Chandler, 13 B. Mon., 403, it was held: It is not good ground of demurrer, that an amended petition departs from the cause of action set out in the original petition.

In McGrath *vs.* Balser, 6 B. Mon., 141, it was held: It is the general rule, that where process is served on an original bill, that the defendant is

bound to take notice of all subsequent proceedings in the cause, though there are exceptions.

In Brookhover *vs.* Hurst, 1 Met., 667, the Court says: "When the action was commenced, a forfeiture of the mortgage had not taken place. The action was brought to recover the possession of a part of the mortgaged property. It was prosecuted by ordinary proceedings, and was brought not to foreclose the mortgage, but merely to obtain possession of the property. The mortgage was forfeited during the pendency of the action, and that fact was set up and relied upon in an amended petition. Had the plaintiff a right to avail himself of that fact, to enable him to succeed in the action? We think he had such a right under the provisions of the Code of Practice. It is provided by section 162, that "the plaintiff and defendant, respectively, may be allowed on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case, occurring after the filing of the former petition, answer or reply." This provision of the Code applies to all actions as well those prosecuted by ordinary proceedings, as those that are prosecuted by equitable proceedings. No distinction is made between them. Facts which occur after the filing of the original petition, and which are essential to the plaintiff's cause of action, may be alleged by leave of Court, by way of supplemental complaint, and be relied upon by the plaintiff to entitle him to a recovery in the action. Although the cause of action be not complete when the original petition is filed, yet, if by facts subsequently occurring, it be rendered complete, the plaintiff is not to be turned out of Court, but may amend his pleadings and allege such facts, in order that he may be enabled to maintain his action."

It is attempted to avoid the effect of Ward's appearance by counsel to the amended or supplemental petition, by terming it a special appearance. And in his brief, he cites numerous authorities upon special appearances, none of which bear at all

upon this case. They are cases, most of them, where there had been no personal service upon the defendant at all ; and others where the appearance was simply to object to a defective service at the outset of the cause. And all of them were cases where the Court had never obtained any jurisdiction whatever of the defendant, and there had never been any appearance except that to object to the jurisdiction, and the appearance was limited to that purpose.

And one of these cases, Commercial Railroad Bank of Vicksburg *vs.* Slocomb, 14 Peters 65 is an authority in Todd's favor, there the Court say :

" But it was contended at the bar, that whatever might have been the original ground of objection to the jurisdiction of the Court, the defendants had appeared by attorney ; and that such an appearance waived all objection to the jurisdiction of the Court. *This is admitted to be a well established rule in pleas of this sort ; in Courts of general jurisdiction where the plea is interposed by individual defendants*, we deem it unnessary, for the purposes of this case, to inquire what would be the effect of an appearance by attorney of an individual defendant in pleading such a plea in the Circuit Courts of the United States which are of limited jurisdiction. But we are clearly of opinion that in the case of a corporation aggregate, no waiver of an objection to jurisdiction could be produced by their appearing and pleading by attorney."

In case of D'Arcy *vs.* Ketchum 11 How., 173, there was no service at all on the defendant in the New York Court.

In Kinney *vs.* Consolidated Vir. Min. Co., 4 Sawyer, 382, the supplemental decree was held void—1st. Because there were no allegations in the bill or pleadings to support it ; 2d. It was made after the rights of the parties had been decided, and case fully ended, and term adjourned ; 3d. A portion of the co-owners were not made parties.

Ward's appearance to the amended petition was not a special appearance to object to the jurisdiction ; it is not so stated in, nor can it be so inferred from the record. He objected to the filing of the amended petition, and excepted to the ruling of the Court allowing it. But he did not object to the jurisdiction, nor limit his appearance to that purpose, nor would it have availed him if he had

Suppose he had then objected to the jurisdiction of the Kentucky Court.

Would not the Court have replied ? The defendant is now here in Court by his attorney in virtue of personal service in this jurisdiction; he has filed a sworn answer to the merits in this cause ; the matters of defence arising on his answer are yet undecided by the Court ; he is now by his answer invoking the jurisdiction of this Court ; no new claim is made against him by this amendment ; this Court is expressly required by sections 161 and 162 of the Code to allow this amendment ; it has jurisdiction of the subject matter of this cause, and of the defendant, and will administer upon and decide all the matters in the pleadings ; the Court upon the defendant's motion and affidavit has set aside a judgment in this cause against him, and by its then order made him a defendant to this action (record, m. p. 49), and he is such a defendant to the whole cause in all its length and breadth, and must take notice of this amended pleading at his peril.

The counsel who prepared the plaintiff's brief, places his client in the anomalous position of standing with an answer in one hand invoking the jurisdiction, power and protection of the Court ; and in the other hand a special plea challenging, denying and defying that very jurisdiction.

Delay Damages.

It is submitted, that an inspection of the record

in this cause, showing the abandonment by the plaintiff, in this Court, of his pleas in the Court below. And the vain attempt, by allegation, of a special appearance, to oust the jurisdiction of the Kentucky Court, sufficiently disclose that plaintiff had no hope or expectation of succeeding in this Court. And that the writ of error was "sued out merely for delay." That this is a proper case for the application of the second paragraph of the 23d rule of this Court, and defendant in error should receive damages for this delay.

Nota Bene.

It is believed, that inasmuch as the plaintiff in error saved no exception to the ruling of the Circuit Court, in sustaining the demurrers to his first and third pleas. And has not in his brief assigned any error upon that ruling of the Circuit Court; that the matters arising on those pleas will not, under the 21st rule, be noticed or passed upon by this Court, except to affirm.

If I am correct in the above supposition, the Court will please stop here in the perusal of this brief,

The remainder relating entirely to the first and third pleas, and was prepared before I had seen the plaintiff's assignment of errors. And is printed only from excessive, perhaps unreasonable caution.

Demurrer to First Plea.

This plea sets up fraud in obtaining the judgment, as a defense to an action on a judgment of a sister State.

While it is admitted, that under some circumstances, in a direct proceeding, on appeal, writ of error, bill of review or original bill to vacate a

judgment or decree, fraud will vitiate a judgment.

It is contended that the law is well settled, that a judgment and especially the judgment of a sister State, cannot in a collateral proceeding be impeached for fraud.

The Constitution of the United States, Article 4, Section 1, provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other State." And Congress, by the act of 1790, Rev. Stat., sec. 905, have provided for carrying this provision into effect.

How is "full faith and credit," or any faith and credit at all given, when you can plead that the judicial proceeding was fraudulently procured, and compel a plaintiff in a distant forum to prove the *bona fides* of the proceeding, and virtually to re-litigate the suit.

The Supreme Court, of Massachusetts, in McRae *vs.* Mattoon, 13 Pickering 53, say "If this were not the law, there would be no end of litigation. If the first judgment were to be impeached for fraud, the second was liable to the same attack, and the third also, and so on. The law would become a game of frauds, in which the greatest rogue would become the most successful player."

Mr. Bigelow, in his work on Estoppel; edition 1872, p. 150, says: "The only cases which we have been able to find, in which it has been directly decided, that a judgment may be collaterally attacked for fraud, by the parties or their privies, are Hall *vs.* Hamlin (2 Watts, 354), and State *vs.* Little (1 N. H., 257). There have been dicta to the same effect by other cases not already cited. But the cases which have decided the question the other way are not so few or so obscure. The point was directly raised in a recent case in the Supreme Court of Iowa (Smith *vs.* Smith, 22 Iowa, 516). The offer to prove that

the judgment had been procured by fraud was rejected in the Court below; exceptions were taken, and the ruling was sustained on appeal. The Court said, "If a judgment can be attacked for fraud in any case, it can only be by a direct proceeding" (Mason *vs.* Messenger, 17 Iowa, 261). And in a late case in Tennessee the same doctrine was held, even as to a judgment rendered by a Justice of the Peace (Kelley *vs.* Mize, 3 Sneed, 59). The attempt there was to rectify a judgment obtained by fraud, by bringing a new action for the same cause; but the Court held the former judgment a bar. The point has been thus decided also as to the judgments of the sister States. And the strongest case upon the subject is one of this class, recently determined in the Supreme Court of the United States (Christmas *vs.* Russell, 5 Wall, 290); and there can now be no doubt that the plea of fraud, by parties and privies is unavailing to disturb the effect of an otherwise valid judgment."

The Law in Kentucky on Collateral Attack of Judgments.

The whole and unbroken current of authority in Kentucky, where the judgment sued on in this cause was recovered, down to the last volume of Reports, both before and since the adoption of its Code in 1851, is that a judgment cannot be collaterally attacked by parties or privies. A judgment, if the Court had jurisdiction, is conclusive between the parties, until vacated by a proper proceeding for that purpose.

In Garner's Adm. *vs* Strode, 5 Littell, 315, it is said: "But we lay it down as a general rule, that if such correction does ever take place, it must be by direct proceeding in that case in which the record is made right." * * * * * "To avoid the effect of a decree in another cause, where its

merits are collaterally brought in question, cannot be permitted."

In Dunlap *vs.* McIlvoy, 3 Litt., 278: "An original decree cannot be impeached, under cover of defending a bill brought to enforce it."

In Green *vs.* Ball, 4 Bush., 590, the Court say: "An erroneous judgment according to numerous decisions of this Court cannot be assailed collaterally."

In Rankin *vs.* Barnes, 5 Bush., 20, the Court say: "The record of the Indiana judgment in the appellee's favor, against the appellant is sufficiently authenticated to sustain this action upon it in the Circuit Court of Harrison County, Kentucky; and though the judgment is apparently harsh and erroneous, yet not being revisible in this Court, it must operate as valid and conclusive until reversed in Indiana."

To the same effect are the cases following:

Commonwealth *vs.* Morrison.

Also cited as

Watson *vs.* Morrison, 4 Bibb., 336.
Sanders *vs.* Gatewood, 5 J. J. Mar., 328.
Newcombe's Exor. *vs* Newcombe, 13 Bush, 545.
Reed *vs.* Hatcher, 1 Bibb., 346.
Wallace *vs.* Usher, 4 Bibb., 509.
Bustard *vs.* Gates, 4 Dana, 430.
Landrum *vs.* Farmer, 7 Bush, 48.
McGlasson *vs.* Bradford, 7 Bush, 252.
Harpending's Exors. *vs.* Wylie, 13 Bush, 159.

The law in Kentucky on attack of Judgments for fraud.

It is contended that both before and since the Code, a judgment in Kentucky cannot be collater-

ally attacked for fraud in its procurement, and the authorities are uniform on this point.

In Thompson *vs.* Ware, 8 B. Monroe, 29, the Court says: "A decree can only be set aside for error or fraud in obtaining it. In the former case it can only be done by appeal, or writ of error or bill of review, and in the latter by original bill."

The only practice pursued in Kentucky, has always been and is now to attack a judgment obtained by fraud by an original proceeding.

Decree obtained by fraud impeached by original bill.

Gill *vs.* Carter, 4 J. J. Mar., 501.

Bill of review to open and set aside decree for fraud.

Baker *vs.* Grundy's heirs, 1 Duvall, 282.

And the following cases are all to the same effect.

Edmondson *vs.* Moseby, 3 Bibb., 348.
Ellis *vs.* Kelly, 8 Bush, 631.
Talbot *vs.* Todd, 5 Dana, 194.
Emerson's Adm. *vs.* Herriford, 8 Bush., 235.
Head *vs.* Perry, 1 Monroe, 258.
Williams *vs.* Fowler, 2 J. J. Mar., 405.
McCown *vs.* Macklin, 7 Bush., 309.

We are confirmed in the view that a judgment in Kentucky can only be attacked for fraud in procuring it, by direct proceedings.

Judge Newman, in his work on Pleading and Practice (in Kentucky, 1871), on pages 34-35, says:

"Bills of revivor, and bills in the nature of bills of revivor, which, however, are now abolished, and all amended or supplemental bills were confined to the Court in which the action sought to be revived or amended was pending. So, likewise, are all proceedings to vacate, suspend, or modify a judgment

in their nature local. The unity and integrity of the record require that errors in a judgment or decree, *or fraud in its obtention*, should be investigated only in the Court in which it was obtained. Hence, bills of review, or bills in the nature of bills of review, or *bills to impeach decrees or judgments for fraud*, and all original bills in the nature of bills of review, as well as bills for new trials, all of which are now called petitions or proceedings to reverse, vacate, or modify judgments, are local, and confined exclusively to the Court in which the original judgment or decree was rendered."

And on pages 224–225 says:

"Bills to impeach decrees or judgments for fraud, as well as bills of review, in most cases are also provided for in the Code under the title of Proceedings to reverse, vacate, or modify judgments; and the proceeding in such cases is expressly declared to be as in actions by ordinary proceedings." * * *

And thus discloses why a fraudulent judgment cannot be collaterally attacked, but must be attacked by direct proceeding since the adoption of the Code, as well as before.

Which is by reason of Title XII of the Kentucky Code, entitled—

"Provisions to reverse, vacate, or modify judgments" (secs. 574 to 585).

The sections of which pertinent to our inquiry are as follows:

SEC. 574.—A judgment rendered or final order made in the Circuit Court may be reversed, vacated or modified either by the Court of Appeals, or by the Court in which the judgment was rendered or order made.

SEC. 575.—A judgment or final order may be reversed or modified by the Court of Appeals for errors appearing in the record.

SEC. 576. The proceedings to obtain such reversal or modification shall be by appeal or writ of error prosecuted as prescribed by law.

SEC. 577. Clerical misprision not ground for reversal.

SEC. 578. Rendering judgment prematurely, a clerical misprision.

SEC. 579. The Court in which a judgment or final order has been rendered or made, shall have power, after the expiration of the term, to vacate or modify such judgment or order:

1. By granting a new trial, for the cause and in the manner prescribed in section three hundred and seventy-three.
2. By a new trial granted in proceedings against defendants constructively summoned, as prescribed in Chapter one, of title ten.
3. For misprisions of the Clerk.
4. For fraud practiced by the successful party in the obtaining of the judgment or order.
5. For erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings.
6. For the death of one of the parties before the judgment in the action.
7. For unavoidable casualty or misfortune, preventing the party from appearing or defending.
8. For errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section four hundred and twenty-one.

SEC. 580. Misprission corrected, on motion, in same Court.

SEC. 581. The proceedings to vacate or modify the judgment or order, on the grounds mentioned in Subdivisions four, five, six, seven and eight, of section five hundred and seventy-nine, shall be by petition, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defence to the action, if the party ap-

plying was defendant. On the petition, a summons shall be issued and be served, and other proceedings had, as in an action by ordinary proceedings.

SEC. 582. A judgment shall not be vacated, on motion or petition, until it is adjudged that there is a valid defense to the action in which the judgment is rendered, or, if the plaintiff seeks its vacation, that there is a valid cause of action; and where a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

SEC. 583. Grounds relied on to vacate, to be first tried.

Sec. 584. Party seeking to vacate may have injunction.

Sec. 585. Premature judgment to be suspended without valid defense.

From which it appears that since the adoption of the Code in 1851, the only remedy in Kentucky for a fraudulent judgment is by petition and summons thereon, under sec. 581 above quoted, which is substantially the same as an original bill in equity. And consequently Ward could not set up this defense in Kentucky to an action on the judgment there. But he had a remedy under the Code (if his defense were true) which he neglected.

The Law of Fraudulent Judgments in this Court.

The law of this Court upon this point seems to be fully settled by the cases of Mills *vs.* Duryee, 7 Cranch, 481, and Christmas *vs.* Russell, 5 Wallace, 290. In the last case (which was like the present one—a suit upon a Kentucky judgment), the authorities were fully reviewed by Justice Clifford, pp. 304-5-6-7. And the Court holds that fraud cannot be pleaded as a defense to a suit on a judgment of a sister State.

And the ruling in this case was affirmed and ap-

proved in the case of Maxwell *vs.* Stewart, 22 Wallace, 77, in which the Court, the Chief Justice delivering the opinion, p. 81, says:

"In Christmas *vs.* Russell this Court held that fraud could not be pleaded to an action in one State upon a judgment in another. With this we are satisfied.

"Since the case of Mills *vs.* Duryee, it has been settled in this Court that *nil debet* is not a good plea to an action upon a judgment in another State."

The law in this Court is therefore settled that the first plea is bad. And the third plea is substantially a repetition of the first and falls with it.

On General Principles.

The first and third pleas are bad on demurrer on the general principles of pleading, because they do not show that Ward has any defense to the original action. No Court would set aside a judgment until it is shown there is some defense to it.

By Statute.

The first and third pleas would be bad in Kentucky and also in Arkansas by statute, the Arkansas Code being copied from that of Kentucky.

Sec. 582 of Kentucky Code above quoted and sec. 3,599 of Arkansas Code being identically the same.

Neither of these pleas show that Ward has any defense to the judgment sued on. The statute, sec. 582, requires "a valid defense to the action in which the judgment is recovered." Therefore the allegations in this answer could not avail him in a direct proceeding by petition or bill in Chancery; much less can they do so in a collateral attack of this character.

Statute of Frauds.

The first and third pleas are both bad on demurrer, because they set up a parol contract for the conveyance of real estate, which is void by the statute of frauds. The contract alleged must have been verbal, because he says in the first plea he was waiting for papers to be prepared.

That statute of frauds can be raised by demurrer.

See Randall *vs.* Howard, 2 Black, 589.

Equitable Defense.

The first and third pleas are bad in the Court below and here, because they set up an equitable defense to an action at law—which cannot be permitted in the Courts of the United States. In those Courts the law and equity jurisdiction are distinct and cannot be changed by State Statutes.

Thompson *vs.* Railroad Companies, 6 Wallace, 134.

Weed Sewing Machine Co. *vs.* Wicks, 3 Dillon, 264.

Third Plea.

This plea is substantially the first plea repeated. It alleges the same fraud as the first plea does, and claims the alleged fraud to be a payment of the *debt*, not a payment of the judgment. It alleges the same facts to be an accord and satisfaction of the debt, not of the judgment. Being a plea to the debt, and of matters antecedent to the judgment, it is substantially a plea of *nil debet*—which has been repeatedly held by this Court from Mills *vs.* Duryee, to Christmas *vs.* Russell, 5 Wall, 290, to be a bad plea to an action on a judgment of another State.

To same effect are Maxwell *vs.* Stewart, 22 Wallace, 77 (quoted above).

Hensly *vs.* Force, 12 Ark., 756.

Payment.

The third plea is bad as a plea of payment of the judgment. It is a plea, if anything, of payment of the debt, not of the judgment ; it is of matter anterior to the judgment, and cannot be a payment of that which was not then in existence. And by the language of the plea, it claims to be of payment of the debt.

Accord and Satisfaction.

The third plea is bad as a plea of accord and satisfaction. It alleges an accord, but shows no satisfaction ; does not show that Ward offered, or attempted to do anything on his part, in pursuance of the alleged agreement that he made or tendered deeds for the property ; that he procured release of his wife's dower ; that he paid, or offered to pay, the prior incumbrances on the property. It does not show that Todd accepted, or had any satisfaction of the alleged accord ; that he received anything from Ward.

Does not show he received the property from Ward, but does show that what he did receive, he obtained from the decree of the Court, and that after Ward had exhausted all his defences to the suit, and that an execution title.

Nudum Pactum.

The agreement alleged by Ward, in his first and third pleas, is a *nudum pactum*, in that it shows no consideration for the alleged promise. Ward had exhausted all his defenses. Todd could take the property on the mortgages and judgment. No benefit could accrue to Todd from such an agreement; certainly not, without deeds, releases or other circumstances not mentioned in the plea.

If such d enses as that set up in the first and third pleas in this cause, can be admitted to an action on a judgment which is entitled to "full faith and credit," the whole constitutional provision and the statute are frittered away.

In every suit on a judgment all that will be necessary to open the cause, and compel the successful party to re-litigate the matters already determined by the solemn adjudication of the Court, will be to put in some such allegation of fraud, as in the present case, no matter how improbable or untrue. And the benefits of the constitutional provision vanish away. And the policy of the law, *interest republicæ ut sit finis litium*, is frustrated.

Respectfully,

CHAS. P. REDMOND,
For Defendant in Error.